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No. 01-1491

In The
Supreme Court of the United States

CHARLES DEMORE,
DISTRICT DIRECTOR, ET AL.,

Petitioners,

v.

HYUNG JOON KIM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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STATEMENT

This case presents a narrow issue. It does not raise any questions about the government's authority to remove aliens who have been convicted of certain crimes. Nor is it about the government's authority to use detention to effectuate removal – *i.e.*, to detain aliens who might otherwise flee or present a danger to the public. Rather, this case is solely about whether Congress has chosen a constitutionally permissible means for implementing these goals: mandatory detention of a broad group of aliens – many convicted of relatively minor crimes – without any individualized determination that their detention is warranted because they present a danger to the community or a flight risk.

The statute at issue in this case, 8 U.S.C. 1226(c), governs the detention of criminal aliens pending proceedings to determine if they are deportable from the United States. The statute requires the Immigration and Naturalization Service (INS) to take into custody any alien who "is deportable" from the United States based on having been convicted of any of a wide range of crimes. *See* 8 U.S.C. 1226(c)(1)(B) & (C). It then prohibits the INS from releasing any such individual (except under very narrow circumstances involving witness protection), *see* 8 U.S.C. 1226(c)(2), including individuals such as the respondent who are longtime legal permanent residents of the United States and who are eligible for various forms of relief from removal.

Respondent was mandatorily detained for six months under Section 1226(c) before the district court ordered that he was entitled to a bond hearing. He does not challenge INS's authority to take him into custody after he finished

serving his criminal sentence. His challenge is solely to Section 1226(c)'s absolute prohibition on his release from detention, even where, as here, the INS never asserted that he posed a danger or significant flight risk and subsequently agreed to release him on a $5,000 bond. But for the decision below, the government would have no choice but to redetain the respondent throughout the conclusion of his immigration proceedings, a period that could extend for months, or possibly years.

A. Legislative Background of 8 U.S.C. 1226(c).

Both before and after Section 1226(c)'s enactment, the government expressed discomfort with the statute's broad mandatory detention requirement.[1] Largely because of these concerns, INS persuaded Congress to defer implementation of Section 1226(c) for two years, and to replace it with "Transition Period Custody Rules" (TPCR). *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), 303(b), Pub. L. No. 104-208, 110 Stat. 3009-586.[2] These rules, which were in effect from

[1] Letter from Jon P. Jennings, Acting Assistant Attorney General to the Honorable Albert Gore, Jr., President of the Senate (June 10, 1999) (Ex. E of Petitioner-Appellee's Brief before the court of appeals) (noting that "in some respects [the statute] went too far" and urging Congress to restore the Attorney General's discretion to release certain aliens).

[2] IIRIRA 303(b)(3) provides:

(A) In general. – During the period in which this paragraph is in effect pursuant to paragraph (2), the Attorney General shall take into custody any alien who –

(i) has been convicted of an aggravated felony (as defined under section 101(a)(43) of the Immigration and Nationality Act, as amended by section 321 of this division),

(ii) is inadmissible by reason of having committed any offense covered in section 212(a)(2) of such Act,

(Continued on following page)

October 1996 until October 1998, permitted the Attorney General to release lawfully admitted criminal aliens who could demonstrate that they were neither a danger nor flight risk. *Id.*

The INS sought an extension of the TPCR based on their success in increasing criminal alien removal as well as INS's continuing concern that Section 1226(c)'s broad detention mandate would undermine INS's enforcement efforts.[3] This effort was unsuccessful and Section 1226(c) took effect in October 1998. Legislation is currently pending in the House Judiciary Committee that would restore the Attorney General's discretion to release from detention

(iii) is deportable by reason of having committed any offense covered in section 241(a)(2)(A)(ii), (A)(iii), (B), (C), or (D) of such Act (before redesignation under this subtitle), or

(iv) is inadmissible under section 212(a)(3)(B) of such Act or deportable under section 241(a)(4)(B) of such Act (before redesignation under this subtitle), when the alien is released, without regard to whether the alien is released on parole, supervised release, or probation, and without regard to whether the alien may be arrested or imprisoned again for the same offense.

(B) Release. – The Attorney General may release the alien only if the alien is an alien described in subparagraph (A)(ii) or (A)(iii) and –

(i) the alien was lawfully admitted to the United States and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding, or

(ii) the alien was not lawfully admitted to the United States, cannot be removed because the designated country of removal will not accept the alien, and satisfies the Attorney General that the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.

[3] *See* Immigration and Naturalization Oversight: Hearings on INS Reform: Detention Issues Before the Senate Subcomm. on Immigration, Comm. on the Judiciary, 1998 WL 767401 (F.D.C.H.), 105th Cong. (1998) (testimony of Doris Meissner, former Comm'r, INS).

lawful permanent residents such as the respondent, who were convicted of crimes for which they were sentenced to less than five years, and who can demonstrate that they pose neither a danger nor flight risk. *See* H.R. 1452, 107th Cong. (2001). Such legislation would encompass respondent and would moot this case.

B. Administrative and District Court Proceedings

Respondent entered the United States in 1984 at the age of six and has lived virtually his entire life in this country as a lawful permanent resident. Pet. App. 2a. All of his immediate family reside in the United States, including his parents and siblings. C.A. E.R. 7. The INS has charged him with deportability based on his 1997 conviction for "petty theft with priors." Pet. App. 2a.[4]

Upon completion of his criminal sentence in February 1999, the INS ordered respondent's immediate detention, even though he had not been ordered deported by an immigration judge and remains eligible for "withholding of removal" under 8 U.S.C. 1231(b)(3). Respondent requested a bond hearing before an immigration judge to demonstrate that he was neither a danger nor flight risk. INS maintained that he was barred from receiving such a hearing under Section 1226(c). Pet. App. 32a.

In May 1999, respondent filed a writ of habeas corpus in district court. Pet. App. 2a. Respondent argued that Section 1226(c) was unconstitutional since it deprived him

[4] This conviction stemmed from respondent's prior conviction for breaking and entering a tool shed for which he received probation. C.A. E.R. 6-7. Respondent was required to serve only half of the three-year sentence he received. C.A. E.R. 7.

of any opportunity to demonstrate that he was neither a danger nor flight risk. Pet. App. 33a. The district court granted the petition, declared Section 1226(c) unconstitutional, and ordered that respondent be provided with an immediate bond hearing to determine whether he was a flight risk or danger. Pet. App. 50a. At that point, respondent had already been detained by the INS for six months.

The government did not seek a stay of the district court's order that it provide the respondent with a bond hearing. It also did not wait for an immigration judge to conduct such a hearing and decide whether respondent should be released. Instead, the INS determined that respondent should be released on a $5,000 bond based on *its own determination* that he posed neither a danger nor flight risk. Pet. App. 2a.[5] Since his release from INS detention, respondent has appeared for all his scheduled hearings. Respondent's next hearing will consider his application for withholding of removal.

[5] Regulations governing the grant or denial of bond to detained aliens provide that the INS makes the initial determination whether an alien poses a danger or risk of flight and is therefore ineligible for bond, 8 C.F.R. 236.1(c)(8), followed by an immigration judge bond hearing to review that determination. During this hearing the INS can argue to the judge why the alien should not be released on bond. 8 C.F.R. 3.19(a), (d). If the immigration judge grants release, the INS can appeal the decision to the Board of Immigration Appeals (BIA) and seek an emergency stay of the release order pending appeal. 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. The INS can also invoke an "automatic stay" of the release order, thereby preventing the alien's release until the BIA rules on the INS's bond appeal. 8 C.F.R. 3.19(i)(2). These regulations were recently strengthened to allow the automatic stay to continue if a release order is upheld by the BIA and the INS seeks certification of the order to the Attorney General. *Id.*

C. The Court of Appeals' Decision.

The court of appeals held that Section 1226(c) violates due process as applied to lawful permanent residents such as the respondent, under the due process analysis set forth by this Court in *Zadvydas v. Davis*, 533 U.S. 678 (2001).[6] First, the court of appeals found that a lawful permanent resident "has an obvious and important personal interest in his or her own liberty during the pendency of removal proceedings." Pet. App. 8a. In light of this liberty interest, the court of appeals then applied the due process test enunciated in *Zadvydas* – namely, had the government put forth a "special justification" for Section 1226(c) that outweighed the deprivation of respondent's liberty. Pet. App. 11a (citing *Zadvydas*, 121 S. Ct. at 2498-99). In applying this test, the court of appeals rejected the government's argument that because Section 1226(c) implicates Congress's plenary authority over immigration, it is subject to only deferential review. Based on *Zadvydas*, the court of appeals found that detention was a "means" of carrying out Congress's plenary immigration authority and thus subject to constitutional constraints. Pet. App. 9a-10a ("The question before us . . . is whether Congress has adopted a constitutionally permissible means of

[6] The court of appeals did not find Section 1226(c) unconstitutional on its face because the statute applies not only to aliens like the respondent who have "entered" the United States ("deportable" aliens), but also to aliens who have not "entered" the United States ("excludable" aliens), and who are therefore not entitled to the same due process protection. The court did not consider the constitutionality of Section 1226(c) as applied to "excludable" aliens and noted that it would present a different question. *See* Pet. App. 6a ("The detention of aliens who have not 'entered' the United States is not before us, and we are not prepared to address, on the record compiled in this case, whether such detention is unconstitutional.").

detention and removal of lawful permanent resident aliens."). The court of appeals observed that "[t]he government made the same plenary powers argument in *Zadvydas* . . . but the Supreme Court rejected it." Pet. App. 10a.

Following this Court's analysis in *Zadvydas*, the court of appeals acknowledged the government's interests in using immigration detention to ensure removal and protect against danger, but held that neither of these interests were sufficient to permit a detention statute that completely eliminates any individualized bond determination. Pet. App. 12a-21a. The court of appeals emphasized that detention under Section 1226(c) is *not* limited to a small group of very dangerous individuals, but applies to individuals convicted of a wide range of crimes, many of whom are eligible for relief from removal,[7] pose no significant danger or flight risk,[8] and are ultimately not even

[7] For example, under *INS v. St. Cyr*, 533 U.S. 289 (2001), some individuals subject to mandatory detention under Section 1226(c) are now eligible for discretionary waivers of removal. Pet. App. 14a. Others are eligible for either withholding or deferral of removal. Pet. App. 13a-14a.

[8] The court of appeals found unpersuasive the government's argument that criminal aliens would fail to appear at their removal hearings, noting that it was based on the erroneous assumption that individuals subject to Section 1226(c) were ineligible for relief and their removal was thus inevitable. Pet. App. 13a (distinguishing *Parra v. Perryman*, 172 F.3d 954, 958 (7th Cir. 1999) on this basis). The court also questioned the government's reliance on an 89% abscondence figure, derived from a 1996 report by the Office of the Inspector General, noting that it was unclear from the report whether the individuals who absconded had been released on bond, or rather, had never been detained in the first instance. Pet. App. 15a-16a. Thus, while the report supported the importance of detention, the court found that it did not support the elimination of individualized bond determinations. *Id.*

ordered deported.[9] Pet. App. 13a-21a. In addition, the court of appeals stressed that the civil detention schemes this Court upheld in *U.S. v. Salerno*, 481 U.S. 739, 747 (1987), *Kansas v. Hendricks*, 521 U.S. 346 (1997), and *Carlson v. Landon*, 342 U.S. 524 (1952), contrast sharply with detention under Section 1226(c) because each allowed for individualized bond determinations whereas Section 1226(c) contains "no provision for an individualized determination of dangerousness." Pet. App. 17a-19a.

The court of appeals also noted that the government's arguments in support of Section 1226(c) are substantially undermined by Section 1231(a)(6), which governs post-final-order detention. Pet. App. 22a-23a. In stark contrast to Section 1226(c)'s prohibition on release of criminal aliens during the period that removal proceedings are pending, Section 1231(a)(6), *permits release* of aliens who have actually been ordered removed and who have no claim to remain in the United States, once the 90-day removal period has passed. The court of appeals reasoned that, having been ordered removed, such aliens are likely to present a greater risk of danger and flight. Thus, "[t]he availability of bail for such aliens . . . casts substantial doubt on the argument that aliens merely subject to removal proceedings are so likely to flee and so dangerous that there is a 'special justification' warranting their detention without bail." Pet. App. 22a-23a.

The court of appeals further explained that Section 1226(c) also could not satisfy the more deferential due

[9] In addition to those granted relief from removal, the court of appeals noted that other individuals successfully challenge the classification of their crimes as "aggravated felonies" and are thus determined not to be deportable in the first instance. Pet. App. 14a-15a.

process test articulated by Justice Kennedy in his dissenting opinion in *Zadvydas*. Pet. App. 23a-26a. Under that test, immigration detention is unconstitutional if it is "arbitrary or capricious." Pet. App. 23a (citing *Zadvydas*, 121 S. Ct. at 2515 (Kennedy, J., dissenting)). Quoting the opinion, the court of appeals explained that "'it is neither arbitrary nor capricious to detain . . . aliens when necessary to avoid the risk of flight or danger to the community,' . . . but . . . such detention requires strict procedural safeguards.'" Pet. App. 23a (quoting *Zadvydas*, 121 S. Ct. at 2515 (Kennedy, J., dissenting)). The court of appeals then noted that the dissent "went through a detailed analysis of the regulations governing post-removal-period detention" before concluding that they were constitutionally sufficient. Pet. App. 24a-25a. Because such release procedures are not available under Section 1226(c), the court of appeals concluded that "if we were to apply Justice Kennedy's analysis in *Zadvydas* to the facts of this case, we would conclude that detention under § 1226(c) is arbitrary and capricious and therefore violates due process." Pet. App. 25a-26a.

Finally, the court of appeals acknowledged, but rejected, respondent's argument that Section 1226(c) should be construed as not applying to lawful permanent residents such as the respondent who had not yet been ordered deported by an immigration judge. Pet. App. 27a-29a. The court of appeals noted that "[c]onsidered in isolation, the 'is deportable' language [in Section 1226(c)] could mean 'subject to a final order of removal entered by an IJ.'" Pet. App. 28a. However, the court of appeals believed that this construction was foreclosed by other provisions of the statute and thus concluded that it was "not at liberty to interpret the statute as postponing the

application of the no-bail provision until after the completion of the alien's removal proceeding before the IJ." Pet. App. 29a.

REASONS FOR DENYING THE WRIT

The government's petition for certiorari should be denied because all of the courts of appeals to consider the issue agree that, in light of this Court's decision in *Zadvydas v. Davis*, 533 U.S. 678 (2001), Section 1226(c) violates due process. The Third, Ninth and Tenth Circuits have considered Section 1226(c) post-*Zadvydas* and have all reached this conclusion. The only court of appeals to uphold Section 1226(c) – under circumstances that are in any event distinguishable – did so pre-*Zadvydas*, applying an analysis that cannot be reconciled with this Court's reasoning. *See* Point 1, *infra*.

The post-*Zadvydas* decisions reflect a straightforward application of the legal standards enunciated in *Zadvydas*. Indeed, the constitutional failure of Section 1226(c) is more fundamental than the question that troubled this Court in *Zadvydas* since the statute provides *no* procedure whereby an individual can demonstrate suitability for release. This Court has never upheld a detention statute that prohibits any individualized determination of whether the purposes of detention are being served. *See* Point 2, *infra*.

Nor does the court of appeals' decision impede in any way the government's ability to detain and remove criminal aliens. Detention continues to be required of any alien who poses a danger or flight risk. The court's decision requires only an individualized determination by the

Attorney General that detention is warranted on this basis. Moreover, the alien bears the burden of proof and must rebut the presumption of danger or flight risk. Notably, in the instant case the government did not have sufficient interest in detaining the respondent to require even a bond hearing. Instead, the INS made its own determination to release the respondent on a $5,000 bond. *See* Point 3, *infra*.

In light of the current consensus among the courts of appeals, the limited impact these decisions have on INS's detention powers, and the possibility that legislation will be enacted amending Section 1226(c), plenary review is, in any event, premature. If a post-*Zadvydas* split among the courts of appeals were to emerge, plenary review may then be warranted. The constitutionality of Section 1226(c) is currently pending in three other circuits. *See* Point 4, *infra*.

1. a. In *Zadvydas v. Davis*, this Court confirmed that immigration detention is subject to due process constraints and clarified the standard for evaluating the constitutionality of such detention. 533 U.S. 678 (2001). In the wake of that decision, three courts of appeals, in three unanimous opinions, applied the due process test set forth by this Court to the question of mandatory detention under Section 1226(c). All three courts – the Ninth Circuit in the case below, the Tenth Circuit in *Hoang v. Comfort*, 282 F.3d 1247 (10th Cir. 2002), and the Third Circuit in *Patel v. Zemski*, 275 F.3d 299 (3d Cir. 2001) – reached the same result: namely, that Section 1226(c) cannot survive a

straightforward application of the due process test enunciated in *Zadvydas*.[10]

b. Given the absence of a conflict among the post-*Zadvydas* court of appeals' decisions, the government's principal contention is that a split exists because of the Seventh Circuit's pre-*Zadvydas* decision in *Parra v. Perryman*, 172 F.3d 954 (7th Cir. 1999). Pet. Br. at 11-12. First, and critically, that case pre-dates *Zadvydas* and therefore is not indicative of the Seventh Circuit's view post-*Zadvydas*. The Seventh Circuit has not yet had an opportunity to revisit the issue. Second, the analysis in *Parra* cannot survive *Zadvydas* because it was premised on the view that persons subject to Section 1226(c) have no constitutionally protected liberty interest sufficient to trigger significant due process protection. *Parra*, 172 F.3d at 958 ("[p]ersons subject to § 1226(c) have forfeited any *legal* entitlement to remain in the United States" and thus have "no constitutional right to remain at large" during their removal proceedings). That view is directly contradicted by this Court's holding in *Zadvydas* that even aliens who have received final orders of deportation have a liberty interest in being free from detention that is sufficiently strong to trigger due process protection. *Zadvydas*, 533 U.S. at 693-94, 696. If aliens who have already been ordered deported have a liberty interest sufficient to trigger due process protection, then *a fortiori*, so must aliens subject to Section 1226(c), who are still challenging

[10] All three cases involved lawful permanent residents. In a fourth case, the Third Circuit in a non-precedential decision applied its reasoning in *Patel* to a non-lawful permanent resident – a deportable asylum applicant who had entered the country without inspection. *Radoncic v. Zemski*, 28 Fed. Appx. 113 (3d Cir. 2001).

their removal and who – despite the Seventh Circuit's erroneous assertion to the contrary – have not yet lost the "right to remain" in this country.[11]

Even if it could survive *Zadvydas*, the Seventh Circuit's decision in *Parra* does not create a true conflict since it hinged on a unique set of facts that are not present in the instant case, nor in any of the other post-*Zadvydas* circuit court decisions. As the Seventh Circuit emphasized, *Parra* involved an individual whose removal was "inevitable" since, although he had not yet received a final removal order, he had conceded removability and raised *no claim* for relief that would allow him to remain in the United States. *See Parra*, 172 F.3d at 958 ("[T]he probability of error is zero when the alien *concedes* all elements that require removal (as Parra has done) . . . . "). *See also Patel*, 275 F.3d at 314 (distinguishing *Parra* on this ground). In contrast, all of the post-*Zadvydas* circuit court decisions involve mandatory detention of individuals who are challenging their removal and may well prevail in their proceedings. *See Hoang*, 282 F.3d at 1252-53 (petitioners Nguyen and Trung seeking withholding of removal and relief under Convention Against Torture, petitioner Hoang seeking relief under Convention Against Torture); *Patel*, 275 F.3d at 314 (petitioner "contests the classification of his offense as an aggravated felony, a challenge that could render removal improper"); *Radoncic*, 28 Fed. Appx. at 114-15 (petitioner challenging denial of asylum

[11] In addition, the Seventh Circuit's decision hinged in large part on its view of the deference owed to Congress because of its plenary power over immigration. *Parra*, 172 F.3d at 958. In light of *Zadvydas*, there is no longer any doubt that immigration detention must comport with due process, notwithstanding Congress's plenary power over immigration. *Zadvydas*, 533 U.S. at 695-96.

and withholding). *See also Patel*, 275 F.3d at 314 (holding mandatory detention unconstitutional for aliens "who have not yet been ordered removed because they are pursuing their administrative remedies").

c. The government attempts to contrive a conflict by noting that the Ninth and Tenth Circuit decisions are limited to lawful permanent residents, whereas the Third Circuit's *Radoncic* decision applies to an alien who is in the country illegally after entering without inspection. Pet. Br. at 11-12. This distinction, however, is plainly not a split. First, and critically, the Third Circuit's *Radoncic* decision is "unreported" and designated as "not precedential." *Radoncic*, 28 Fed. Appx. at 113. It thus lacks any binding or precedential value even within the Third Circuit. *See* 3d Cir. I.O.P. 5.3 (designating unreported opinions as "not precedential"); 3d Cir. I.O.P. 5.8 ("unreported opinions" are not binding precedent and are not cited as authority by the court). The Third Circuit, therefore, is free to address the issue in a subsequent case, without regard to the *Radoncic* ruling. Second, none of the other courts of appeals have squarely considered Section 1226(c) as applied to a non-lawful permanent resident. Therefore, how these courts might decide the issue remains an open question.

Finally, although the Ninth and Tenth Circuit decisions are limited to lawful permanent residents, their reasoning is not inconsistent with the *Radoncic* result that Section 1226(c) is unconstitutional as applied to an alien who entered the United States unlawfully. While lawful permanent residents enjoy a favored status under our immigration laws, the Due Process Clause applies to any alien who has entered the United States, even one who entered illegally and whose "presence here is . . . unlawful." *Zadvydas*, 533 U.S. at 693 (citing, *inter alia*, *Plyler v.*

Doe, 457 U.S. 202, 210 (1982)). Thus, Radoncic is entitled to due process protection, notwithstanding his unlawful entry. As the court of appeals made clear, the critical distinction that is constitutionally significant is between aliens who are stopped at the border ("excludable" aliens), and those who are apprehended by the INS after having effectuated an entry – whether legal or illegal ("deportable" aliens). *See* Pet. App. 5a-6a. *See also* n.6, *supra*. No court has held that Section 1226(c) is unconstitutional as applied to excludable aliens.

2. The government focuses most of its petition on arguing that the court of appeals' decision is incorrect, despite uniform application by the courts of appeals of *Zadvydas*. *See* Pet. Br. at 12-18. However, the ruling of the court of appeals correctly applies this Court's decision in *Zadvydas*, and is compelled as well as by this Court's prior decisions in *U.S. v. Salerno*, 481 U.S. 739 (1987), *Foucha v. Louisiana*, 504 U.S. 71 (1992), *Kansas v. Hendricks*, 521 U.S. 346 (1997) and *Carlson v. Landon*, 342 U.S. 524 (1952).

a. The court of appeals' decision reflects a straightforward application of the legal standard enunciated in *Zadvydas*. In *Zadvydas*, this Court emphasized that civil detention is justified only when the government provides a "special justification" that outweighs an individual's liberty interest. 533 U.S. at 690. As the court of appeals correctly held, Section 1226(c) cannot withstand scrutiny under this test since it requires *mandatory* detention for a broad group of aliens, many of whom pose no danger or flight risk.

The government never disputes that Section 1226(c) requires the detention of some individuals who pose no

danger or flight risk. Nonetheless, it tries to justify mandatory detention under Section 1226(c) on the grounds that it applies only to aliens who "have enjoyed full due process protections in connection with [their] convictions" and thus "have *already* been accorded the opportunity for an individualized hearing on the essential predicate for their detention . . . ." Pet. Br. at 13. That is plainly not the question. The "individualized hearing" to which the government refers does not address the constitutionally-significant question of whether the alien presents a flight risk or danger; it refers to the process these individuals previously received on the criminal charges leading to their convictions – for which they have already served their sentences.

The constitutional problem presented by Section 1226(c) is thus even more fundamental than the one presented in *Zadvydas*, since Section 1226(c) involves lawful permanent residents, with no final orders of removal, who are detained without *any* individualized determination that the purposes of detention are being served. *Cf. Zadvydas*, 533 U.S. at 691-92 (emphasizing importance of "strong procedural protections" to ensure that the purposes of detention are being served); *id.* at 721-24 (Kennedy, J., dissenting) (emphasizing that post-final-order detention in *Zadvydas* included procedures for aliens to show they were no longer dangerous, and that more than half of post-final-order detainees were released under these procedures). If the availability of release procedures was insufficient to negate the constitutional concerns regarding indefinite detention of aliens with final orders of removal, then a complete absence of any release procedures for lawful permanent residents who are

detained *without* final orders must present equally profound and even greater constitutional concerns.

The government's argument that the due process analysis in *Zadvydas* is irrelevant, because it concerned indefinite post-final-order detention whereas detention under Section 1226(c) is time-limited (Pet. Br. at 13-14), misses the point. First, under *Zadvydas*, it is the deprivation of liberty that triggers a due process claim. Second, unlike *Zadvydas*, where individuals are entitled to individualized release procedures after only *90-days* of detention (*see* 8 U.S.C. 1231(a)(6)), under Section 1226(c), individuals are denied any possibility of release, despite detention that routinely last months and even years.[12] Moreover, while detention under 1226(c) does not have the

[12] As the court of appeals emphasized, it makes no sense to require detention of aliens *before* they are ordered removed, yet permit their release on bond *thereafter*. Pet. App. 22a-23a ("[D]espite the greater likelihood of flight and dangerousness of aliens already ordered removed, § 1231(a)(6) permits their release on bail."). The government attempts to rationalize this distinction by arguing that the individuals entitled to release under Section 1231(a)(6) are individuals who face potentially permanent detention, since they "cannot be removed . . . within the 90-day removal period" and their "removability therefore may be in serious doubt." Pet. Br. at 14 n.7. But the government has chosen to apply Section 1231(a)(6) not only to criminal aliens whose countries will not take them back, but also to criminal aliens who are seeking judicial review of final BIA removal orders and whose orders have been stayed during that process. *See* Memorandum from Bo Cooper, INS General Counsel, to Regional Counsel, "Detention and Release of Aliens with Final Orders of Removal" (March 16, 2000) (Ex. M of Petitioner-Appellee's Brief before the court of appeals). Like detention under Section 1226(c), such detention is also time-limited, since the process of judicial review – although often prolonged – necessarily comes to an end. Notably, the government offers no rationale for requiring mandatory detention during administrative removal proceedings, but allowing release of these same aliens during a period in which they are seeking judicial review.

same potential for permanence as the post-final-order detention in *Zadvydas*, it is nonetheless often prolonged. *See, e.g.*, *Patel*, 275 F.3d at 313 (petitioner mandatorily detained for eleven months before released on bond following court of appeals' decision); *Bouayad v. Holmes*, 74 F. Supp. 2d 471, 476 (E.D. Pa. 1999) (noting removal proceedings, even those involving detained aliens, "may take several years" to resolve); *Kiareldeen v. Reno*, 71 F. Supp. 2d 402, 404 (D.N.J. 1999) (alien detained 18 months by INS before winning case before BIA). Mandatory detention under 1226(c) often lasts well beyond the six-month period that this Court found presumptively reasonable for individuals who have already received final removal orders. *Zadvydas*, 533 U.S. at 701.

b. Given that Section 1226(c) necessarily requires the detention of some individuals who pose no danger or flight risk, the government is forced to defend the statute on the grounds that because Congress has plenary power over immigration, 1226(c) is entitled to special deference. Pet. Br. at 16-18. However, this argument – that immigration detention is different from other kinds of detention and thus subject to only the most limited judicial review – was specifically rejected by this Court in *Zadvydas*. *See Zadvydas*, 533 U.S. at 696.

Moreover, as set forth in the court of appeals' decision below, Section 1226(c) also fails the more deferential constitutional test endorsed by Justice Kennedy's *Zadvydas* dissent. 533 U.S. at 718-24 (Kennedy, J. dissenting). The dissent (joined by Chief Justice Rehnquist) found that immigration detention cannot be "arbitrary or capricious," that the government may detain removable aliens who are dangers or flight risks, but that the constitutionality of such detention hinges on "whether there are adequate

procedures" for them to show that "they no longer present special risks or danger." *Id.* at 721. Notably, in evaluating the post-final-order detention in *Zadvydas*, the dissent emphasized two sets of procedures: (1) that aliens subject to post-final-order detention "have been determined to be removable after a fair hearing under lawful and proper procedures," *id.* at 718; and (2) that the post-removal-period detention procedures themselves provided for individualized assessments of danger and flight risk. *Id.* at 722-23. The dissent further stressed that more than half of post-final-order detainees obtained release under these procedures, that "the procedural protection here is real, not illusory[,] and the criteria for obtaining release are far from insurmountable." *Id.* at 723.

In contrast, Section 1226(c) provides none of these procedural protections. Individuals detained under Section 1226(c) have not yet been ordered removed. Thus they have not had the protection of "a fair hearing under lawful and proper procedures." Nor is there any procedure whatsoever that provides for individualized assessment of danger or flight risk. The court of appeals was thus clearly correct in finding that Section 1226(c) would be "arbitrary and capricious" under this standard. Pet. App. 23a-26a.

c. Indeed, the government does not, and has never, cited a single case where this Court has upheld categorical and mandatory detention, as is imposed by Section 1226(c). Every detention scheme upheld by this Court has included an individualized determination that the purposes of detention are being served. For example, the pretrial detention statute upheld by this Court in *Salerno* requires "a full-blown adversary hearing" where the government "must convince a neutral decisionmaker . . . that no conditions of release can reasonably assure the

safety of the community or any person." Pet. App. 17a-18a (citing *Salerno*, 481 U.S. at 750). Similarly, the sexual predator detention statute upheld in *Hendricks* requires that the government prove both dangerousness and mental abnormality beyond a reasonable doubt. Pet. App. 17a-18a (citing *Hendricks*, 521 U.S. at 358). *See also Kansas v. Crane*, 534 U.S. 407 (2002).

The government does not acknowledge the significance of these decisions. Instead, it cites *Carlson v. Landon*, 342 U.S. 524 (1952), and *Reno v. Flores*, 507 U.S. 292 (1993), as examples of this Court rejecting due process challenges to immigration detention. Pet. Br. at 18. But these decisions underscore the uniqueness of Section 1226(c), since the detention schemes in each of these cases provided for the very kind of individualized custody determinations that Section 1226(c) prohibits. *See Carlson*, 342 U.S. at 538, 541-42; *Flores*, 507 U.S. at 313-14. *See also* Pet. App. 19a (noting that "in *Carlson* there was only a presumption, not a certainty, of detention, and the possibility of discretionary release pending the proceedings was central to the Court's approval of the detention scheme").

d. In addition, the government disputes the court of appeals' reasoning that individualized determinations of danger and flight risk are consistent with Congress's objective of ensuring that aliens ordered removed actually appear for deportation. Pet. Br. at 14-17. In support, the government cites various legislative statements and reports. Pet. Br. at 14-16. Yet, none of these sources offer any support for the *mandatory* detention imposed by

Section 1226(c),[13] and the court's view of the reports was, in any event, not critical to its holding. *See also* Point 3.b., *infra*.

3. a. The decision below – and the similar decisions of the Third and Tenth Circuit – will not have the dire effects the government suggests because the ruling does not disturb the Attorney General's authority to detain any criminal alien who presents a danger or flight risk. The holding simply requires that detention be based on a determination that detention is warranted to ensure the alien's deportation or to protect public safety.[14] Significantly, the regulations governing detention establish a presumption of danger and flight risk that the alien must rebut, a standard respondent does not challenge. *See* 8 C.F.R. 236.1(c)(8). Furthermore, in any case where an immigration judge authorizes release over the INS's objection, the agency may appeal the decision and request a stay of the release order. *See* 8 C.F.R. 3.19(f), 3.19(i)(1), 3.38. Indeed, the regulations now provide that any immi-

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[13] For example, the government places great emphasis on Congress's conclusion that "detention is key to effective deportation." Pet. Br. at 16 (quoting conclusion of the Inspector General's 1996 report on "Deportation of Aliens After Final Orders Have Been Issued"). But the court of appeals' decision acknowledges the government's compelling interest in detaining criminal aliens who pose a danger or flight risk, and holds only that individualized determinations of danger and flight risk would *further*, rather than compromise, the government's objectives. Pet. App. 16a.

[14] Thus, the government's repeated emphasis on the "importance" Congress placed on "detaining criminal aliens during removal proceedings," (Pet. Br. at 12-13), as well as the large numbers of aliens that have been – and continue to be – detained pursuant to Section 1226(c) (*id.*), is beside the point. Nothing in the court of appeals' ruling prevents the INS from detaining criminal aliens who present a danger or flight risk.

gration judge release order is "automatically stayed" if the INS simply files a "Notice of Service Intent to Appeal Custody Redetermination" with the immigration court. *See* 8 C.F.R. 3.19(i)(2). Thus, it is difficult to fathom any case in which an alien whose detention the government believes is warranted would be released.

The limited impact of the court's ruling is further evidenced by the fact that the government has not sought to stay implementation of any of the courts of appeals' decisions invalidating section 1226(c) (nor even sought review of the Third Circuit's seminal *Patel* decision.) Nor has the government sought to stay implementation of the dozens of district court rulings that have ordered bond hearings for individuals detained under Section 1226(c). Moreover, where an immigration judge has thereafter ordered an alien's release on bond, in many cases the INS has not appealed the release order at all. Indeed, in this case the INS, on its own and without requiring an immigration judge hearing, agreed to respondent's release on bond after the district court ordered the INS to make an individualized determination of whether release was warranted. This affirms the court of appeals' conclusion that many aliens subject to mandatory detention pose no danger or flight risk that requires detention.[15]

[15] That individualized bond determinations do not undermine INS's criminal alien removal efforts is further supported by the success of the Transition Period Custody Rules during the two years they were in effect, *see* IIRIRA 303(b)(3), as well as an INS-commissioned study by the Vera Institute for Justice which found high appearance rates for criminal aliens released under the study. *See Patel*, 275 F.3d at 312 n.9 (citing Vera Institute study). Indeed, individualized bond determinations are an accepted part of the criminal justice system. The aliens who are subject to mandatory detention under Section 1226(c) were

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b. Nor do the legislative sources and studies cited by the government support its position that mandatory detention of all those encompassed by Section 1226(c) is necessary to achieve Congress's goal of effectuating the deportation of criminal aliens. In many cases, these studies were based on earlier statutory provisions that affected a far narrower class of immigrants than are affected by the provisions currently in place, even under the court of appeals' order.[16] In addition, the studies contain no evidence linking the "no-show" or "absconder" rates to the inaccuracy of individualized bond determinations. Rather, they point to a myriad of factors – ranging from the government's failure to identify criminal aliens upon completion of their criminal sentences, to lack of detention space, to the INS's failure to maintain accurate records of changes of address and to notify aliens of their hearing dates and/or to serve them with surrender orders. *See, e.g.*, Office of the Inspector General, U.S. Dep't of Justice, Inspection Report, Immigration and Naturalization Service Deportation of Aliens After Final Orders

entitled to individual bond hearings in their *criminal* proceedings, and many – if not most – of them were released on bond pending those proceedings.

[16] Under the earlier provisions, the overwhelming majority of aliens, even those with criminal convictions, were entitled to release absent a showing by the government of danger or flight risk. *See, e.g.*, 8 U.S.C. 1252(a) (1994) (limiting presumption of detention to "aggravated felons"). In contrast, under the detention procedure now in place as a result of the court of appeals' order, the presumption of detention applies to a far broader group of individuals, not just those convicted of aggravated felonies – a class which has itself been greatly expanded – but to virtually any alien convicted of a crime.

Have Been Issued, Rep. No. I-96-03 (Mar. 1996), at http://www.usdoj.gov/oig/ i9603/i9603.htm (OIG report).[17]

The government also argues (based on information not available to the court of appeals) that the court of appeals misread the OIG report as *not* supporting a 90% absconder rate for aliens with final orders of deportation. However, even if that were the case – which remains unclear – the court of appeals' interpretation of the report comprised only a small part of its reasoning and was in no way necessary to its holding.[18] Indeed, the court *agreed* with the report's fundamental conclusion that "'[d]etention is key to effective deportation.'" Pet. App. 16a. The critical question is *which* aliens should be detained and what procedures should govern that determination. *See also Patel*, 275 F.3d at 312 (noting that even a 90% failure to appear rate would not justify imprisoning the 10% of aliens "who would dutifully report to proceedings," since

[17] The government cites a 1996 House of Representative report's conclusion that "[a] chief reason why many deportable aliens are not removed from the United States is the inability of the INS to detain such aliens throughout the course of their deportation proceedings." Pet. Br. at 15. However, this referred to the INS's lack of detention space, not the failure of individualized determinations to correctly identify which aliens were likely to flee.

[18] The court's discussion of the OIG report came only after fully explaining why mandatory detention encompasses many aliens who may never be ordered deported and do not present a flight risk. Pet. App. 13a-15a. Indeed, a 90% absconder rate for individuals with final orders of deportation is not a reliable indicator of flight risk for individuals who have not yet been ordered deported and are eligible for relief from deportation.

detention of such aliens "furthers no government goal, while generating a considerable cost to the government").[19]

c. The government has not argued, nor could it, that review is warranted on the ground that the court of appeals' decision in any way jeopardizes national security. Pet. App. 29a-30a.[20] In fact, as previously set forth, the INS has repeatedly argued that Section 1226(c)'s prohibition of individualized determinations of danger and flight risk *inhibits* the agency's enforcement flexibility by forcing it to devote scarce resources to the detention of individuals

[19] Notably, the OIG report did not suggest mandatory detention as the solution to the absconder problem. It proposed a variety of other measures, such as "taking aliens into custody at hearings *when a final order is issued* at the hearing" and "delivering surrender notices personally instead of mailing them to aliens." *See* OIG report at 3, 13 (emphasis added). Nor did either of the House of Representatives reports cited by the government (Pet. Br. at 15) recommend mandatory detention. The proposed statute discussed in House of Representatives Report 104-469(I) endorsed a detention provision almost identical to the one now in place as a result of the court of appeals' decision – release on bond for "lawfully admitted" aliens in deportation proceedings who can demonstrate lack of danger and flight risk. *See* H.R. Rep. No. 104-469, pt. 1 (1996). The proposed statutory amendments discussed in House of Representatives Report No. 104-22 made no mention of detention at all.

[20] For cases of aliens involving national security, special detention provisions apply that are not at issue here. *See* 8 U.S.C. 1226A (2002) (enacted by Section 412 of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272) (providing for mandatory detention of aliens certified by the Attorney General as suspected terrorists); 8 U.S.C. 1536 (authorizing detention of aliens charged in special terrorist removal proceedings). Notably, Section 1536 allows for individualized bond hearings for lawful permanent residents charged as terrorists, further undermining the need for Section 1226(c)'s prohibition of such hearings. *See* 8 U.S.C. 1536(a)(2). Moreover, national security presents distinct justifications. *See* Pet. App. 29a-30a; *Zadvydas*, 533 U.S. at 695-96.

like the respondent who pose no danger or flight risk. *See* "Legislative Background of 8 U.S.C. 1226(c)," *supra*. Indeed, it was largely because of these concerns, and INS's acknowledged lack of detention space, that Congress agreed to defer implementation of Section 1226(c)'s mandatory detention requirement for two years. *See* IIRIRA 303(b)(2). At present, legislation is pending before the House Judiciary Committee that would restore the Attorney General's discretion to release individuals such as the respondent who pose no danger or flight risk and would negate the need for plenary review.[21]

4. Finally, in this case the INS itself has determined that respondent poses no danger or flight risk and should be released from detention. Thus, the government is seeking to compel the INS to *redetain* an individual it concedes does not need to be detained. This result would further no interest of the government and does not warrant intervention by this Court.[22]

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[21] The government makes a vague assertion that individualized bond determinations would be "administratively cumbersome." Pet. Br. at 15. But current regulations already provide for an immigration judge custody hearing where individuals such as the respondent can contest whether they are properly subject to mandatory detention under Section 1226(c). *See* 8 C.F.R. 3.19(h)(2)(ii). The court of appeals' ruling merely authorizes immigration judges to also consider danger and flight risk, as they already do in non-criminal alien cases. *See* 8 C.F.R. 3.19(a) & (d), 236.1(c)(8). In any event, the government has provided no evidence of any administrative burden imposed by the court of appeals' ruling.

[22] In addition, in this particular case the constitutional issue can be avoided by construing Section 1226(c) as not applying to a lawful permanent resident such as the respondent who has not yet been ordered deported by an immigration judge. Although respondent raised this statutory argument in the court of appeals and it was rejected, the court's reasoning appears to have been based on an erroneous

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Moreover, given the unanimity of the post-*Zadvydas* decisions and the pendency of federal legislation that would significantly ameliorate the scope of Section 1226(c) (and render it inapplicable to respondent), it is premature for the Court to grant plenary review. The constitutionality of Section 1226(c) is currently pending before the Second, Fourth, and Sixth Circuits. *See Zgombic v. Farquharson*, No. 00-6165 (2d Cir.), *Welch v. Ashcroft*, No. 00-7665 (4th Cir.), *Ly v. Hanson*, No. 01-3016 (6th Cir.), and *Danesh v. Jenifer*, No. 01-1735 (6th Cir.). Thus, this Court will have other opportunities to determine if plenary review is warranted.

5. The government has also filed for a petition for a writ of certiorari in *Elwood v. Radoncic*, No. 01-1459, which it identifies as a companion case. For the same reasons set forth here, that petition should also be denied. In addition, the Third Circuit's *Radoncic* decision is a particularly inappropriate vehicle for addressing the

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assumption – namely, that criminal aliens are not placed in removal proceedings or ordered removed until after they have finished serving their criminal sentences. *See* Pet. App. 28a-29a (noting that the term "is deportable" in Section 1226(c) "could mean 'subject to a final order of removal entered by an IJ[,]' " but concluding that this construction was foreclosed because "[t]he rest of the statute makes clear that the alien is subject to no-bail detention – that is, 'is deportable' – as soon as he or she is released from custody for the criminal conviction."). In fact, Congress intended that criminal aliens would undergo removal proceedings while serving their criminal sentences, and thus would already have orders of deportation by the time they were released from criminal incarceration. *See* 8 U.S.C. 1228(a) (providing for expedited prison removal proceedings for criminal aliens). Thus, construing Section 1226(c) as requiring mandatory detention of lawful permanent residents only if they have been ordered deported by an immigration judge, is consistent with both the plain language of the statute and congressional intent.

issues raised by Section 1226(c) for at least three reasons: First, it is an unpublished decision with no precedential effect either within or outside the Third Circuit. *See* Point 1.c., *supra*. Second, the case presents a substantial mootness question since the government itself states that Radoncic is no longer subject to detention under Section 1226(c), having received a final BIA removal order. Pet. for Cert. in *Radoncic* at 21. *See also* Pet. Br. at 5 ("Detention of an alien following entry of a final order of removal is governed by [8 U.S.C. 1231(a).]"). Indeed, at the time of the court of appeals' decision, Radoncic had already received this removal order, and thus the case was arguably moot at that time. Finally, Radoncic was never properly subject to mandatory detention under Section 1226(c), since he was never charged with deportability on one of the grounds designated under the statute. *Cf. Matter of Ching*, 12 I. & N. Dec. 710, 712-13 (BIA 1968) (construing "is deportable" language in former suspension of deportation provision as requiring actual charge of deportability under the designated ground).[23]

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[23] The government initially charged Radoncic with removability under 8 U.S.C. 1251(a)(1)(B) (1994) (illegal entry), Pet. Br. in *Radoncic* at 5, and subsequently under an additional ground, Section 1251(a)(1)(E)(i) (1994) (alien smuggling), Pet. Br. in *Radoncic* at 6-7. Neither of these are grounds for mandatory detention under Section 1226(c).

CONCLUSION

In sum, in light of this Court's decision in *Zadvydas*, and the other reasons stated herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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